IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TODD HUSO and SUSAN HUSO, a married couple,	)	
	)	No. 63242-6-I
Appellants,	)	
v.	)	DIVISION ONE
PHOENIX DEVELOPMENT, INC., a Washington corporation, and THE CITY OF WOODINVILLE, a municipal corporation,	)	UNPUBLISHED OPINION
Respondents.	)	FILED: June 1, 2010

Spearman, J.-A trial court has the discretion to grant a nonsuit with or without prejudice under CR 41(a)(4), especially as a part of the court's inherent power to impose a sanction of dismissal. Because the trial court's unchallenged findings about the Husos' harassing and abusive behavior during discovery provide an ample basis for such a sanction, we reject the Husos' argument that the trial court erred by dismissing their case with prejudice. We also reject the Husos' argument that the trial court abused its discretion in declining to grant a third trial continuance. We affirm.

FACTS

Phoenix Development sought to develop land adjacent to land owned by

the Husos. The Husos claimed a public right of way had been established years earlier, and sued for declaratory and injunctive relief. A contentious discovery process ensued.

First Continuance and Withdrawal of the Husos' Counsel. On September 23, 2008, the Husos filed a motion to allow depositions beyond the discovery cutoff date and to continue the trial date, which was then set for October 27, 2008. Three days later, counsel for the Husos, Michael Daudt, filed a notice of intent to withdraw. After the defendants objected to the notice of intent to withdraw, Daudt moved for leave to withdraw, citing "serious disagreements concerning the manner in which this case should be and was being handled." On October 16, 2008, the court granted Daudt's motion for leave to withdraw, as well as the motion to continue. Trial was set for February 23, 2009. The order continuing the trial date did not fully grant the relief sought by the Husos, who sought to depose the individuals listed in their motion. Instead, the order stated only that "[n]ot later than October 27, 2008, the parties shall submit the scheduled dates for depositions of any remaining witnesses."

Husos' Behavior During Discovery. On October 23, 2008, Greg Rubstello, counsel for the City of Woodinville, sent a letter to the Husos offering dates for the depositions of various witnesses. On November 13, 2008, rather than coming to an agreement regarding depositions the Husos served subpoenas, none of which were in compliance with CR 45(a)(4). The subpoenas purported to

compel depositions of numerous people, including opposing counsel Greg Rubstello, three Woodinville city council members, the city manager, and the city planning director.

On November 19, 2008, Greg Rubstello wrote a letter to the Husos advising them that both the issuance of unauthorized subpoenas and the attempt to seek information protected by the attorney-client privilege by deposing opposing counsel were improper. Rubstello indicated that neither he nor those witnesses who required subpoenas would appear for the depositions.

The next day, November 20, the Husos responded to Rubstello by accusing him of "attempting to impede the discovery process" and engaging in "[m]isconduct." Rubstello wrote another letter, attempting to correct the Husos' misconceptions, and indicating that Rubstello would accept service of the subpoenas once the defects were cured.

Three days later, on November 23, Susan Huso responded by writing a nine-page letter to Rubstello. Among other things, the letter claimed Rubstello had been "carrying on [a] ridiculous superiority challenge"; engaging in "[c]oercion"; "attempting to marginalize us in public"; intentionally misrepresenting material facts to the court; and "misusing 'attorney-client privilege' to protect nefarious behaviors." The letter also described Susan Huso's belief that her former attorney, Michael Daudt, was conspiring with city employees to settle the case for a low amount. The letter reiterated the Husos' demand that they depose

opposing counsel, and threatened a motion to compel.

Husos' Motions to Compel. On November 26, 2008, the Husos filed a motion to compel depositions, including the deposition of opposing counsel Greg Rubstello. The motion also sought an extension of the discovery cutoff and a request for sanctions. On December 1, 2008, the Husos re-filed the same motion to compel, apparently because of typos in the first filing. Plaintiffs did not meet and confer with opposing counsel as required by KCLR 37 before filing their motion.

On December 12, 2008, the Husos filed a second motion to compel, this time seeking "depositions of domains by proxy and godaddy.com." They filed this motion after attempting to subpoena records of a blog that was apparently reporting on city council meetings where the Husos' lawsuit was discussed. The motion to compel alleges, among other things, that the targets of the subpoenas were using "the 'attorney-client' relationship to cloak a client in an event that their client has committed prosecutable criminal acts."

Second Motion to Continue. On January 22, 2009, the Husos attempted to file another motion to continue the trial date. The motion, however, was not stamped "filed" by the court until January 29, 2009. Although the court did not receive the motion until January 29, 2009, it is nevertheless clear that the defendants were served with the motion on January 22 because their responses were filed on January 28, 2009. This motion to continue was based solely on the

fact that the trial court had not yet ruled on the two motions to compel.

Second Continuance. On January 26, 2009, three days before the court received the Husos' second motion to continue, the trial court issued three orders: (1) an order denying the Husos' motion to compel "depositions of Domains by Proxy and Go Daddy.com"; (2) an order denying the motion to compel the Husos' requested depositions; and (3) an order extending the discovery cutoff to March 2, 2009 and continuing the trial date to March 23, 2009.

Husos' Motion for Voluntary Non-suit. On February 5, 2009, the defendants filed motions for summary judgment, which were noted to be heard on March 5, 2009. On February 17, 2009, Paul A. Spencer filed a limited notice of appearance on behalf of the Husos.

On February 20, 2009, the court denied the Husos' motion to continue, which had been pending since January 29. The same day, the Husos moved for a voluntary nonsuit without prejudice. The defendants opposed dismissal without prejudice, and the motion was heard on March 4, 2009, the day before the summary judgment hearing.

After hearing argument, the court denied the Husos' motion for voluntary nonsuit without prejudice, and instead gave the Husos two options. The Husos could either dismiss the case with prejudice under CR 41(a), or go forward with summary judgment and possibly trial. The Husos selected dismissal with prejudice. The court's order, which included findings of fact and conclusions of

law, dismissed with prejudice based largely on findings regarding the Husos' abusive and harassing behavior during discovery.

Appeal. The Husos have appealed only two orders: the February 20, 2009 order denying their motion to continue the trial date, and the March 4, 2009 order dismissing the case with prejudice. The Husos have not assigned error to any of the court's findings or conclusions.

DISCUSSION

Denial of Motion to Continue Trial Date

The Husos argue the trial court's order denying their motion to continue was error. "The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We review a trial court's decision to grant or deny such a motion for abuse of discretion. Downing, 151 Wn.2d at 272. We will not disturb a trial court's decision unless the appellant shows that the decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Downing, 151 Wn.2d at 272 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The trial court's decision here was neither unreasonable nor based on untenable grounds. The Husos were seeking another continuance because, according to the Husos, the trial court had not yet ruled on their motions to compel depositions and extend the discovery cutoff. However, by February 20,

2009, the date the court denied the motion to continue, the court had already denied both motions to compel. In other words, the court had already declined to permit the additional discovery for which the Husos sought a continuance.[1] Additionally, although the court declined to compel the depositions requested by the Husos, the court nevertheless granted their request to extend the discovery cutoff date, moving it to March 2, 2009 and issuing a new trial date of March 23, 2009. Thus, by the time the court ruled on the motion to continue, it had already extended the discovery cutoff by more than a month and continued the trial date for a second time.

Given that discovery was complete, and in light of the fact that the Husos had already received two continuances, we hold the trial court did not abuse its discretion in declining to continue the trial date for a third time.

Dismissal With Prejudice Under CR 41(a)

The Husos next argue the court erred by dismissing the case with prejudice under CR 41(a).[2] This court reviews an order regarding a motion to

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[1] We note that the Husos did not appeal from the orders denying the motions to compel.

[2] CR 41(a) governs voluntary dismissal:

"(1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

"(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

"(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

"(2) *Permissive*. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

"(3) *Counterclaim*. If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication

dismiss for manifest abuse of discretion. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (2003). Abuse occurs when the ruling is manifestly unreasonable or discretion was exercised on untenable grounds. Escude, 117 Wn. App. at 190.

The Husos rely primarily on our decision in Escude to argue the trial court erred by dismissing with prejudice. There, we held that dismissal with prejudice was appropriate because the plaintiffs had already conceded in response to summary judgment that those claims had no merit before they sought dismissal under CR 41(a). Escude, 117 Wn. App. at 192. The Husos note that we held dismissal with prejudice under CR 41(a) was only to be exercised under "limited circumstances" where dismissal without prejudice would be "pointless." Thus, the Husos contend that a trial court may not properly dismiss a case with prejudice under CR 41(a) unless it first finds that "all of [plaintiffs'] claims [are] not viable." We disagree. In Escude, we held that dismissal with prejudice under CR 41(a)(4) was a proper mechanism by which the trial court could exercise its inherent authority to impose sanctions:

> Under the plain language of the rule it is evident that a trial court may dismiss a claim with prejudice, otherwise the language of the rule would be superfluous. Our Supreme Court has held that a trial court has the discretion to grant a nonsuit with or without prejudice, especially as a part of the court's inherent power to impose a sanction of dismissal in a proper case.

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by the court.

"(4) *Effect*. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state."

Escude, 117 Wn. App. at 191 (citing In re Detention of G.V., 124 Wn.2d 288, 297-98, 877 P.2d 680 (1994)).

Here, the trial court's order of dismissal set forth findings of fact which provided numerous bases for dismissal with prejudice.

- This case has been pending for twenty-one months, and the plaintiffs have already received at their request two trial continuances.
- During the subsequent five months, plaintiffs took no action of record to engage new counsel, and then engaged new counsel who entered a limited notice of appearance for the sole purpose of seeking additional trial delay.
- During those five months, plaintiffs engaged in abusive, harassing and oppressive activity, insulting the City's representatives and officials, and seeking to abuse the discovery process by noting the depositions of City councilmembers, the City's attorneys, and totally unrelated third parties.
- Here, the voluntary dismissal is being sought for no other reason than the denial by this court of the Husos' motion to continue the March 23 trial date, and was scheduled the day before the summary judgment scheduled for March 5.
- The Husos and its limited appearance attorney Paul A. Spencer rejected an offer by the court to allow the trial date to be continued on a day to day basis while Mr. Spencer was in trial in Snohomish County beginning March 23, 2009 as he informed the court.
- The Husos have not informed the Court of any other efforts to obtain the services of any other attorney and/or why another attorney without a conflict on March 23, 2009 was not being considered.

  . . .
- The Husos have failed to submit to the court any declarations or other evidence to contest the new evidence before the Court of summary judgment . . .

  . . .
- The PLAINTIFF'S MOTION FOR VOLUNTARY NON-SUIT signed by attorney Paul A. Spencer on behalf of the Husos is clearly interposed for the purpose of causing unnecessary delay and needless increase in the cost of litigation.

Significantly, the Husos did not assign error to any of the trial court's findings and conclusions, and as such, they are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).[3]

Moreover, the trial court offered the Husos a choice, and they chose to accept dismissal with prejudice:

> The Plaintiffs, being given the option of a dismissal under CR 41(a)(1)(B) with prejudice, have elected to request a voluntary non-suit with prejudice in lieu of proceeding with the hearing of the pending summary judgment motions and the trial as scheduled, if a trial is necessary, therefore, the above entitled and numbered cause of action is dismissed with prejudice. The court retains jurisdiction to consider motions by defendants for reimbursement of fees and expenses.

In other words, rather than move forward with the summary judgment motions, which were scheduled for the next day, and to which the Husos had not responded, the Husos decided to accept dismissal with prejudice, and then appeal.

The trial court's order was neither unreasonable nor based on untenable grounds. Under CR 41(a)(4), dismissal with prejudice was a proper mechanism by which the court exercised its "inherent power to impose a sanction of dismissal," Escude, 117 Wn. App. at 191, and we hold the court did not abuse its

[3] Although the Husos failed to assign error to any of the findings, they belatedly argue in their reply brief that the trial court's finding regarding "abusive, harassing and oppressive activity" is not supported by the record. See Reply Brief at 8. Arguments raised for the first time in a reply brief generally will not be addressed, and we decline to do so here. Cowiche Canyon, 118 Wn.2d at 809; RAP 10.3(c). We note, however, that even if we were to consider the argument, the trial court's findings regarding the Husos' behavior during discovery are amply supported by the record.

discretion.

Attorney Fees

Respondents seek attorney fees on appeal, arguing they are entitled to such fees as CR 11 sanctions. Specifically, respondents point to the trial court's finding that the Husos "engaged in abusive, harassing and oppressive activity" as evidence the Husos should be sanctioned under CR 11. Respondents, however, did not designate any order from the trial court awarding CR 11 sanctions. More importantly, respondents failed to note that the trial court specifically crossed-out references to CR 11 in the proposed findings. Under these circumstances, we decline to award attorney fees.

Affirmed.

Spearman, J.

WE CONCUR:

Cox, J.

Grosse, J.